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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUPRALIFE INTERNATIONAL, Plaintiff and Respondent, v. STEVEN WHITING et al., Defendants and Appellants.	D044368 (Super. Ct. No. GIC787735)

APPEAL from an order of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Affirmed.

I.

INTRODUCTION

Defendants Steven Whiting, The Institute for Nutritional Science Limited (the Institute), and Phoenix Nutritionals, Inc. (Phoenix), appeal from an order denying their motion to compel arbitration of claims brought against them by plaintiff SupraLife International (SupraLife). The trial court determined that although SupraLife was a party to the Independent Contractor Agreement (the Agreement) that provided for arbitration of

any claims SupraLife might have against Whiting and the Institute, the court could not order arbitration of SupraLife's claims against Phoenix because Phoenix was not a party to the Agreement. The trial court denied the defendants' motion to compel arbitration pursuant to Code of Civil Procedure[1] section 1281.2, which allows a trial court to "refuse to enforce [an] arbitration agreement," if "the court determines that a party to the arbitration is also a party to litigation in a pending court action. . . ."

Defendants claim the trial court should have compelled SupraLife to arbitrate its claims against Phoenix because Phoenix is an agent of Whiting and the Institute, and Whiting signed the Agreement as director of the Institute. The defendants also contend that the trial court should have ordered SupraLife to arbitrate its claims against Phoenix on the ground that Phoenix is a third party beneficiary of the Agreement. Further, the defendants maintain that Civil Code sections 1589 and 3521 and the doctrine of equitable estoppel require that SupraLife arbitrate its claims against Phoenix. Finally, the defendants claim that the court abused its discretion under section 1281.2 because it could have eliminated the risk of conflicting rulings by compelling arbitration as to all of the claims against all of the defendants, including Phoenix.

We affirm the order denying the motion to compel arbitration.

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1 All subsequent statutory references are to the Code of Civil Procedure unless otherwise specified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The Agreement between SupraLife and the Institute provided that the Institute would perform various consulting and promotional services in connection with SupraLife's manufacturing, marketing, and distribution of nutritional supplements and other health-oriented products, in exchange for a monthly retainer fee. Whiting signed the Agreement as the director of the Institute. The Agreement contained an arbitration clause that provided:

> "Arbitration. Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by binding arbitration in San Diego, California, in accordance with the rules then in effect of the American Arbitration Association, and judgment rendered upon the award, including such reasonable attorney's fees as may be awarded by [sic] the prevailing party, may be entered in any court having jurisdiction thereof."

Phoenix was not a party to the Agreement.

In March 2002, SupraLife filed this action against the defendants. In its first cause of action, SupraLife alleged that Whiting and the Institute breached the Agreement. In the remaining causes of action, SupraLife alleged conversion, unfair business practices, trade secret violations, intentional interference with economic relationships, and trade libel, as to all of the defendants.

The defendants moved to strike the lawsuit under the anti-SLAPP statute (§ 425.16). The trial court denied the motion. In December 2003, this court affirmed the trial court's order denying the defendants' anti-SLAPP motion. (*SupraLife International v. Whiting* (Dec. 17, 2003, D040721) [nonpub. opn.].)

Shortly thereafter, the defendants filed a motion to compel arbitration.[2] In the motion to compel, defendants asserted that SupraLife had entered into the Agreement with Whiting and the Institute and that the Agreement had an arbitration clause that covered the dispute. SupraLife filed an opposition in which it argued that the motion to compel should be denied because Phoenix was not a party to the Agreement. SupraLife also maintained that the defendants had waived their right to arbitration. The defendants filed a response to SupraLife's opposition in which they argued that they had not waived their right to arbitrate. The defendants also argued that Phoenix was entitled to enforce the arbitration clause in the Agreement because SupraLife had alleged in its complaint "that Phoenix was formed by the defendant Whiting and the defendants acted as each others [sic] agents . . . ."

The trial court issued a tentative telephonic ruling denying the motion to compel. In its ruling, the court stated:

> "Defendant's Motion to Compel arbitration is DENIED. Plaintiff has not met its heavy burden to establish waiver or prejudice. However, because the contract containing the arbitration provision was not signed by defendant Phoenix Nutritionals, Inc., this case would proceed as to only one of the three defendants concerning the same issue of law and fact as would be arbitrated with defendants Whiting and The Institute of Nutritional Science Limited. In view of the waste of judicial resources and the danger of conflicting rulings, the court declines to compel arbitration. (§ 1281.2, [subd.] (c).)"

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2 We reject SupraLife's claim that Phoenix was not among the parties moving to compel arbitration. The notice of motion to compel arbitration listed Phoenix as a defendant and stated that the motion was being brought on behalf of "Defendants Steven Whiting et al. . . ." The motion to compel arbitration is signed by the "attorney for Defendants, Steven Whiting, Phoenix Nutritionals, Inc. and the Institute of Nutritional Science Limited."

The defendants filed a notice of oral argument. The notice stated:

> "The issues to be heard are as follows:
>
> "1. Whether the right to compel arbitration exists for a third party beneficiary defendant that was not a party to the contract containing the arbitration provision;
>
> "2. Whether the Federal Arbitration Act preempts Code Civ. Proc. § 1281.2[, subd.] (c)."

At oral argument, the defendants argued that pursuant to *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406 (*Dryer*), an agent of a signatory to an arbitration agreement may compel arbitration of claims brought against it by a second signatory to the agreement. The defendants argued that Phoenix could compel SupraLife to arbitrate its claims against Phoenix because SupraLife had alleged in its complaint that each of the defendants were agents of each other.

In response, SupraLife argued that the defendants had not cited *Dryer, supra,* 40 Cal.3d 406, in their briefs or in their notice of oral argument. SupraLife's counsel argued that if defendants were going to be allowed to rely on *Dryer* as the basis of their argument, SupraLife should be allowed to brief "that issue." The trial judge stated he did not think "the issue" had been addressed in the papers. The defendants noted that a reply brief had been filed, but that the *Dryer* case was not mentioned in that brief. The following exchange then occurred:

> "The Court: I missed the reply somehow.
>
> "[Defendants' counsel]: Here is my copy of it.
>
> "The Court: Did you address this issue?

> "[Defendants' counsel]: I did not author the papers, but my co-counsel did.
>
> "[SupraLife's counsel]: He didn't address that issue.
>
> "The Court: I don't think it was addressed. That is the problem and now we are dealing with it in oral argument.
>
> "[Defendants' counsel: Yes, we are, your honor. I apologize for that, but in preparation for this hearing today I looked at what I found to be a controlling . . . case. I think it's my duty to bring that to the court's attention.
>
> "The Court: I can't change my ruling. It wouldn't be fair to the plaintiffs, because they haven't had a chance to address the issue.
>
> "[Defendants' counsel:] Your honor, would the court allow the parties to file a supplemental brief about this and continue this oral argument?"

The court denied defendants' request to be allowed to submit supplemental briefing, confirmed its tentative ruling and denied the defendants' motion to compel arbitration. The defendants timely appeal. [3]

III.

DISCUSSION

A. The trial court did not err in refusing to compel Supralife to arbitrate its claims against Phoenix on the ground that Phoenix is Whiting's and the Institute's agent because defendants did not present sufficient evidence of agency.

The defendants claim the trial court erred in refusing to compel SupraLife to arbitrate its claims with Phoenix, maintaining that arbitration of those claims is

appropriate because Phoenix is the agent of both Whiting and the Institute. More specifically, the defendants argue that the trial court improperly refused to consider its argument that Phoenix is an agent of a signatory to the Agreement. We need not decide whether the trial court erred in refusing to consider the defendants' agency argument because the defendants failed to present sufficient evidence that Phoenix was an agent of a signatory to the Agreement.[4] Any error committed by the trial court in refusing to consider the argument was thus harmless because the trial court could not, as a matter of law, have found that Phoenix was the agent of either Whiting or the Institute.

In *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218, the court outlined a party's burden in seeking to compel arbitration in the trial court:

> "The petitioner must allege the existence of an agreement to arbitrate the controversy (§ 1281.2); facts necessary for a determination of its enforceability are proven by affidavits or declarations. (*Rosenthal*[, *supra,*] 14 Cal.4th 394, 413-414.) Furthermore, '[t]he provisions [of the arbitration agreement] shall be set forth verbatim or a copy shall be attached to the petition and incorporated by reference.' (Cal. Rules of Court, rule 371.) The court must then conduct a summary

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3 An order denying a motion to compel arbitration is appealable pursuant to section 1294, subdivision (a). (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

4 It was the defendants' burden to demonstrate arbitrability. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*).) In their motion to compel arbitration, the defendants did not provide any argument or evidence as to how Phoenix, a nonparty to the Agreement, could compel SupraLife to arbitrate its claims against Phoenix. The defendants' first reference to the agency issue was in their reply to SupraLife's opposition. In light of our conclusion that the defendants failed to present sufficient evidence that Phoenix was entitled to enforce the arbitration clause as an agent to a signatory to the Agreement, we need not determine whether the defendants could properly raise for the first time in their reply an issue on which they had the burden of proof.

> hearing 'in the manner . . . provided by law for the . . . hearing of motions. . . .' (§ 1290.2.)"

"Because the existence of the agreement [to arbitrate] is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal, supra,* 14 Cal.4th at p. 413.)

"Agency is generally a question of fact. [Citations.] Where conflicting evidence of agency is presented, we review the trial court's determinations for substantial evidence. [Citation.] . . . 'When the essential facts are not in conflict and the evidence is susceptible to a single inference, the agency determination is a matter of law for the court. [Citation.]' [Citations.]" (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 562.)

In *Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, the court considered whether allegations contained in an unverified complaint constituted sufficient evidence of the existence of an alter ego relationship between various individual stockholder defendants and a corporation for purposes of exercising personal jurisdiction over the individuals. The plaintiffs claimed the trial court had properly concluded that it had personal jurisdiction over the individual defendants because the defendant corporation had admitted doing business in California and the plaintiffs' complaint alleged that the corporation was the alter ego of the individual defendants. (*Id*. at p. 212.) On appeal, the court held that the unverified complaint did not constitute sufficient evidence upon which to base a finding of an alter ego relationship:

> "We observe, further, that at the time the motion to quash was heard the extant complaint was the first amended complaint. This

> complaint was unverified and therefore could not serve as an affidavit. [Citations.] . . . The allegations in the first amended complaint that defendants Doe One through Doe Ten were doing business under the name of Sheard do not suffice to allege an *alter ego* relationship but, assuming that they did *and that the complaint was verified*, the facts purported to be stated are hearsay and must be disregarded because they are made on information and belief. [Citations.]" (*Sheard, supra,* 40 Cal.App.3d at p. 213, fn. omitted.)

In the footnote omitted from the quotation above, the *Sheard* court also noted that:

> "There appears to be authority for the rule that affidavits on information and belief, although conclusions or hearsay, become evidence when admitted without objection. [Citations.] Assuming that this is a correct rule, objection to the allegation was made by petitioners in their memorandum of points and authorities on the ground that it was made on information and belief in an *unverified* complaint." (*Sheard, supra,* 40 Cal.App.3d at p. 213, fn. 1.)

In this case, the only "evidence" the defendants submitted in support of their claim that Phoenix is an agent of Whiting and the Institute are statements taken from SupraLife's complaint alleging that: (1) Whiting and a person named Alicia Steckling had formed Phoenix; and (2) all of the defendants were agents of each other.[5] In its

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[5] In this court, the defendants claim that a declaration submitted by Whiting in support of the defendants' unsuccessful anti-SLAPP motion "essentially says" that Phoenix and Whiting are agents of each other. However, this declaration was not before the trial court when it ruled on the motion to compel arbitration. Therefore, we do not consider it here.

In any event, the declaration does not "essentially say[]" that Phoenix is Whiting's agent. On the contrary, Whiting's declaration states that "my capacity with Phoenix is substantially the same as with SupraLife with the exception of my financial interest in product sales." The Agreement between the Institute and SupraLife contains a "No Agency" clause that states that The Institute is *not* SupraLife's agent.

answer, Phoenix denied all of SupraLife's allegations, including the allegation of agency.[6]

SupraLife's conclusory and disputed allegation that all of the defendants are agents of each other, made upon information and belief, did not constitute sufficient evidence of agency upon which the trial court could have based a finding that Phoenix was an agent of Whiting or the Institute. (*Sheard, supra,* 40 Cal.App.3d at p. 212.) SupraLife's allegation that Whiting and another person had "formed" Phoenix is similarly not sufficient to establish that Phoenix is an agent of either Whiting or the Institute.

We reject defendants' argument that *Dryer*, *supra*, 40 Cal.3d 406, stands for the proposition that a plaintiff's mere allegation of agency constitutes sufficient evidence of agency for purposes of compelling arbitration. In *Dryer*, a professional football player sued the Los Angeles Rams and various individuals associated with the Rams, alleging that the Rams had removed him from the team's active roster, in violation of his contract. (*Dryer, supra,* 40 Cal.3d at p. 409.) The Rams filed a petition to compel arbitration based on an arbitration clause in Dryer's contract. (*Ibid*.) The trial court denied the petition to compel arbitration as to the individual defendants because they were not parties to the contract containing the arbitration clause. (*Dryer, supra*, 40 Cal.3d at p. 411.)

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6 Therefore we reject defendants' assertion in their reply brief that "Phoenix admitted [the allegation of agency] without contradiction from SupraLife in its papers below. . . ."

The Supreme Court reversed the trial court. (*Dryer, supra*, 40 Cal.3d at p. 418.) In support of its holding ordering arbitration as to the individual defendants, the *Dryer* court noted that Dryer alleged that "three of the four individual defendants are being sued in their capacities as 'the owners, operators, managing agents and in control [sic] of a Professional Football Team. . . ." (*Ibid*.) The *Dryer* court also stated that the trial court could not logically determine that all of Dryer's claims arose from the contract that contained the arbitration clause and at the same time conclude that Dryer could avoid arbitration of claims arising from that contract. (*Ibid*.)

In this case, SupraLife's complaint does not contain any factual basis for its allegation of agency among the defendants. Further, as discussed in part III(C), *post*, SupraLife's claims against Phoenix did *not* arise out of the Agreement. Therefore, unlike in *Dryer*, Phoenix's potential liability is not contingent upon its status as an agent of a signatory to an agreement containing an arbitration clause.

The defendants failed to present sufficient evidence that Phoenix was an agent of a signatory to the Agreement. Accordingly, we conclude the trial court did not err in refusing to compel SupraLife to arbitrate its claims against Phoenix based on defendants' claim that Phoenix was an agent of Whiting or the Institute.[7]

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[7] We conclude only that the defendants failed to present sufficient evidence of agency, and express no opinion as to whether or not Phoenix is in fact an agent of a signatory to the Agreement.

B. The defendants waived their claim that the trial court erred in refusing to compel SupraLife to arbitrate its claims with Phoenix on the basis that Phoenix is a third party beneficiary of the Agreement.

The defendants claim the trial court erred in not finding that Phoenix was a third party beneficiary of the Agreement.

"Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract. [Citation.] However, where . . . the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law. . . ." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233.) "A question of fact . . . is not properly raised for the first time on appeal." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 983.)

The defendants state in their brief that "a third party beneficiary is a third person for whose benefit a contract is made," and assert that payments made to the Institute "obviously inured directly to the benefit of Phoenix." SupraLife disputes this assertion in their brief. The defendants never raised the argument that Phoenix was an intended third party beneficiary of the Agreement in the trial court.

It is clear that the defendants' conclusory and disputed statement that payments made to the Institute "obviously inured" to Phoenix's benefit, does not establish as a matter of law that Phoenix was a third party beneficiary of the Agreement.[8] We

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8 Defendants also state in their brief that it is undisputed that Phoenix is a competitor of SupraLife. The defendants also note that the Agreement provided that "Dr. Whiting and the Institute agreed to assist SupraLife in every aspect of selling its

conclude that whether Phoenix was or was not an intended third party beneficiary of the Agreement is, in this case, a question of fact that the defendants may not raise for the first time on appeal. Defendants have waived their claim that Phoenix was a third party beneficiary of the Agreement and we do not consider it here.

C. Neither Civil Code sections 1589 and 3521 nor the doctrine of equitable estoppel require that SupraLife arbitrate its claims against Phoenix.

The defendants claim that Civil Code sections 1589 and 3521, as well as the related doctrine of equitable estoppel, require SupraLife to arbitrate its claims against Phoenix. The defendants concede that they did not raise this claim before the trial court, but contend that they may raise the claim on appeal because they are relying on undisputed facts.

1. Reviewability and standard of review.

"[A] change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record. . . .' " (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; accord *Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207 [noting that "[a]lthough [plaintiff] did not suggest this theory to the trial court, it presents only a question of law and is therefore cognizable in this appeal"].) In *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1716 (*Metalclad*), the court held that the question of the applicability

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products," in exchange for a monthly retainer fee. Defendants fail to explain why SupraLife would intend such a contract to benefit its *competitor*, Phoenix. This further demonstrates why defendants have not established as a matter of law that Phoenix is a third party beneficiary of the Agreement.

of the doctrine of equitable estoppel in the arbitration context raises a question of law that is reviewed de novo where the claim is based on undisputed facts.

Defendants claim that SupraLife is bound by the arbitration clause in the Agreement because SupraLife's complaint is premised upon the Agreement. Because this claim is based solely on the undisputed content of SupraLife's complaint, we consider the claim, applying a de novo standard of review.

2. The merits.

Civil Code section 1589 provides in relevant part, "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Civil Code section 3521 similarly provides, "He who takes the benefit must bear the burden."

In *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 81 (*NORCAL*), the court relied on Civil Code section 3521 in reversing a trial court's denial of an insurance company's petition to compel arbitration. In *NORCAL*, the insurance company had provided the defendant with a defense in a malpractice action brought against the defendant and her husband pursuant to an insurance policy that contained an arbitration clause. (*NORCAL, supra,*84 Cal.App.4th at p. 77.) The insurance company provided the defense in the malpractice prior action under a reservation of rights because the insurance company claimed the defendant was not covered under the policy. (*Ibid*.) That action resulted in a settlement funded by the insurance company. (*Id*. at p. 68.) The insurance company later filed a petition to compel arbitration of its claims that the defendant was not covered under the policy and that the damages in the malpractice action were not

covered pursuant to the policy's exclusion for sexual misconduct. (*Id*. at p. 69.) The *NORCAL* court held that because the defendant had sought and benefited from a legal defense provided under the policy that contained the arbitration clause, and because the defendant had also demanded arbitration of other claims, which she later withdrew, the defendant was required to arbitrate her dispute with the insurance company. (*Id*. at p. 81.)

In *Metalclad, supra,* 109 Cal.App.4th at page 1713, the court, applying federal law, described the application of the doctrine of equitable estoppel in the arbitration context:

> " 'Equitable estoppel precludes a party from asserting rights "he otherwise would have had against another" when his own conduct renders assertion of those rights contrary to equity.' ([*International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH* (2000)] 206 F.3d [411,] 417-418 [*International Paper*].) In the arbitration context, a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him. (*Id.* at p. 418; *NORCAL* [, *supra,*] 84 Cal.App.4th [at p. 81].)"

Some courts have held as a matter of federal law that, "in certain limited instances, pursuant to an equitable estoppel doctrine, a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff." (*Grigson v. Creative Artists Agency L.L.C.* (5th Cir. 2000) 210 F.3d 524, 526 (*Grigson*).) The doctrine applies where the signatory "seek[s] to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the

other hand, deny [*sic*] arbitration's applicability because the defendant is a non-signatory." (*Id.* at p. 528.)

For example, in *International Paper*, a buyer of an industrial saw (International Paper) brought suit against the manufacturer of the saw (Schwabedissen) on the basis of a contract between Schwabedissen and the distributor of the saw (Wood), which contained an arbitration clause. (*International Paper*, *supra,* 206 F.3d at pp. 413-414.) The *International Paper* court concluded that "the buyer cannot sue to enforce the guarantees and warranties of the distributor-manufacturer contract without complying with its arbitration provision. . . ." (*Ibid*.) The court reasoned:

> "The Wood-Schwabedissen contract provides part of the factual foundation for every claim asserted by International Paper against Schwabedissen. In its amended complaint, International Paper alleges that Schwabedissen failed to honor the warranties in the Wood-Schwabedissen contract, and it seeks damages, revocation, and rejection 'in accordance with' that contract. International Paper's entire case hinges on its asserted rights under the Wood-Schwabedissen contract; it cannot seek to enforce those contractual rights and avoid the contract's requirement that 'any dispute arising out of' the contract be arbitrated." (*International Paper*, *supra*, 206 F.3d at p. 418.)

Similarly, in *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.* (7th Cir. 1981) 659 F.2d 836, 840-841, the court concluded that a signatory to an agreement containing an arbitration clause was equitably estopped from refusing to arbitrate its dispute with a nonsignatory. The court reasoned, "[I]t would be manifestly inequitable to permit Hughes [a signatory] to both claim that J.A. [a nonsignatory] is liable to Hughes for its failure to perform the contractual duties described in the [arbitration agreement] and at the same time deny that J.A. is a party to that agreement in

order to avoid arbitration of claims clearly within the ambit of the arbitration clause." (*Id*. at pp. 838-839.)

In this case, the defendants claim that SupraLife, a signatory to the Agreement, must arbitrate its claims against Phoenix, a nonsignatory to the Agreement. Assuming that the doctrine of equitable estoppel applies to questions of arbitrability under the California Arbitration Act,[9] it is clear that defendants have failed to carry their burden of demonstrating why either Civil Code sections 1589 and 3521 or the doctrine of equitable estoppel apply in this case. Beyond asserting that SupraLife has "sued on the Agreement," the defendants do not provide any argument as to how SupraLife's claims against Phoenix "seek to hold [Phoenix] liable pursuant to duties imposed by the [A]greement." (*Grigson*, *supra*, 210 F.3d at p. 528.)

In its first claim, SupraLife alleges a breach of contract based on the Agreement. However, that claim is against Whiting and the Institute only. The remainder of SupraLife's claims are against all of the defendants. However, SupraLife does not seek to hold Phoenix liable for duties that arise from the Agreement (*Grigson*, *supra*, 210 F.3d at p. 528), and none of its claims against Phoenix "hinge" on the Agreement. (*International Paper*, *supra*, 206 F.3d at p. 418.) The second cause of action is for conversion of customer and distributor data. The third cause of action is for unfair business practices

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9 It is undisputed that the California Arbitration Act (§ 1280 et seq.) provides the applicable law governing this case, and we proceed under that assumption. The defendants have not cited any cases that have directly applied the doctrine of equitable estoppel in the arbitration context as a matter of California law.

based on the alleged misappropriation of customer and distributor lists. In the fourth and fifth causes of action, SupraLife alleges trade secret violations based on the improper use of customer and distributor lists. The sixth cause of action alleges the intentional interference with SupraLife's economic relationships with its customers and distributors. In the seventh cause of action, SupraLife alleges trade libel based on allegedly false and disparaging remarks made by the defendants to SupraLife's customers and distributors. Finally, in the eighth cause of action, SupraLife claims the defendants have been unjustly enriched by their actions and seeks the imposition of a constructive trust.

In sum, the claims against Phoenix are not based on duties imposed on Phoenix pursuant to the Agreement. (*Grigson*, *supra*, 210 F.3d at p. 528.) Accordingly, we conclude that neither Civil Code sections 1589 and 3521 nor the doctrine of equitable estoppel require SupraLife to arbitrate its claims against Phoenix.

D. The trial court did not abuse its discretion under section 1281.2 in refusing to enforce the arbitration clause in the Agreement.

The defendants claim the trial court erred in refusing to enforce the arbitration clause in the Agreement because the court could have ordered all of the defendants, including Phoenix, to arbitration, pursuant to section 1281.2. We review this claim under the abuse of discretion standard of review. (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 101.)

Section 1281.2 provides in relevant part:

> "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if

> it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] . . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . . [¶] . . . . [¶] If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

The defendants claim it was an abuse of discretion not to order *all* of the defendants to arbitration pursuant to this statute, including Phoenix.[10] We have previously concluded in part III (A)-(C), *ante,* that the defendants have failed to establish that Phoenix can be considered a party to the arbitration agreement. Therefore, the trial court did not abuse its discretion in refusing to order all of the parties to arbitration pursuant to section 1281.2.

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10 The defendants do not argue that the trial court abused its discretion in refusing to order SupraLife to arbitrate with Whiting and The Institute pursuant to its power to "order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration." (§ 1281.2, subd. (c).)

The defendants also do not contend that section 1281.2, subdivision (c) is preempted by the Federal Arbitration Act. (See *Cronus Investments, Inc. v. Concierge Services, LLC* (2003) 107 Cal.App.4th 1308, review granted July 16, 2003, S116288.)

IV.

CONCLUSION

The trial court did not err in refusing to compel SupraLife to arbitrate its claims against Phoenix on the ground that Phoenix is an agent of a signatory to the Agreement. The defendants have waived their claim that the trial court erred in refusing to compel SupraLife to arbitrate its claims against Phoenix on the ground that Phoenix is a third party beneficiary of the Agreement. Neither Civil Code sections 1589 and 3521 nor the doctrine of equitable estoppel require SupraLife to arbitrate its claims against Phoenix. Finally, because Phoenix cannot be considered a party to the arbitration agreement, the trial court did not abuse its discretion in refusing to enforce the arbitration clause in the Agreement pursuant to section 1281.2.

V.

DISPOSITION

The order is affirmed. SupraLife is entitled to costs on appeal.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.